IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 590

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION AND
THE COMMONWEALTH & SOUTHERN CORPORATION.

No. 591

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Petitioner,

v.

FEDERAL POWER COMMISSION AND SOUTH CAROLINA ELECTRIC & GAS COMPANY.

BRIEF FOR THE COMMONWEALTH & SOUTHERN CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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Opinions and Orders Below.

South Carolina Public Service Authority (herein called "Authority") has prayed for writs of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered November 10, 1948 reported at 171 F.(2d) 948 (1948). A copy of the opinion and order is set forth in the printed record at pages R-SEC

310-317 and R-FPC 324-331[1]. The said order of the Court of Appeals for the Fourth Circuit affirmed opinions and orders of the Securities and Exchange Commission (herein called "SEC") under the Public Utility Holding Company Act of 1935[2] (herein called the "Act") and of the Federal Power Commission (herein called "FPC" under the Federal Power Act[3] which approved respectively the sale by The Commonwealth & Southern Corporation (Delaware) (herein called "Commonwealth") and the acquisition by South Carolina Electric & Gas Company (herein called "Electric & Gas") of all the common stock of South Carolina Power Company (herein called the "Power Company"). The opinions and orders of the two federal commissions are set forth in the printed record, the opinion and order of the SEC at pages R-SEC 2-29 and the opinion and order of the FPC at pages R-FPC 2-10.

Jurisdiction.

The judgment of the Court of Appeals for the Fourth Circuit was entered on November 10, 1948 (R-SEC 317; R-FPC 331). The jurisdiction of this Court is invoked under Section 24(a) of the Public Utility Holding Company Act of 1935 (August 26, 1935, c. 687, Title I, Sec. 24(a), 49 Stat. 834; 15 U.S.C., Sec. 79x(a)), Section 313(b) of the Federal Power Act (August 26, 1935, c. 687, Title II, Sec. 213, 49 Stat. 860; 16 U.S.C. Sec. 825(1)(b)), Section 10 of the Administrative Procedure Act, (June 11, 1946, c. 324, Sec. 10, 60 Stat. 243; 5 U.S.C. 1009) and Title 28, United States Code, Sections 1254 and 2101.

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1. References to the printed record are designated "R-SEC" in the case of the record on review of the SEC's order, and "R-FPC" in the case of the record on review of the FPC order, followed by appropriate page numbers.

2. August 26, 1935, c. 687, Title I, Sec. 33; 49 Stat. 838; 15 U. S. C. Sec. 79.

3. August 26, 1935, c. 687, Title II, Sec. 212; 49 Stat. 847; 16 U. S. C. Sec. 791 et seq.

Statutes Involved.

Pertinent provisions of the Public Utility Holding Company Act of 1935 and of the Federal Power Act are set forth in the printed record at pages R-SEC 109-111 and page R-FPC 110, respectively.

Question Presented.

The question presented is whether the court below erred in affirming the orders of the SEC and the FPC approving respectively the sale by Commonwealth and the purchase by Electric & Gas of all the common stock (800,000 shares) of the Power Company, in view of the fact that a public authority made a conditional offer of a higher price if, as and when its extremely doubtful legal power to make the purchase should be established.

The question is not as stated by petitioner, whether the court below erred in holding that the decision of the Supreme Court in South Carolina in *Creech* v. *South Carolina Public Service Authority*, 200 S. C. 127, 20 S. E. (2d) 645 (1942), was a bar to the right of petitioner to acquire the stock of the Power Company because no such decision was made. The Court did no more than to confirm, in strong terms, the finding of the SEC that under the law of South Carolina there was "grave doubt" of the Authority's legal power to make such a purchase. Nor is there a question as stated by petitioner whether the court below erred in approving the refusal of both said commissions to consider relevant evidence because the commissions did consider all relevant evidence on the issues before them. Because of the "grave doubt" as to the Authority's legal power to make the desired purchase, the issue that it asserts was presented to the commissions and the court by its desire to buy was never, in fact, reached.

Statement.

Commonwealth is a public utility holding company registered as such under the Act. The Power Company, a

subsidiary of Commonwealth for many years, carries on the electric, gas and local transportation business in Charleston, South Carolina and an electric business throughout the southwestern portion of that state. Adjoining its properties on the north for a considerable distance and interconnected therewith at four points are the electric properties of Electric & Gas, a utility company operating electric, gas and local transportation business in Columbia, South Carolina and supplying electricity throughout the northwestern area of the state. The Authority, a state agency, owns and operates the so-called Santee-Cooper Hydro-Electric Project and has facilities interconnecting with those of both the Power Company and Electric & Gas, to both of which it is now selling or has in the past sold electric energy.

Early in 1947 Commonwealth consented, subject to various conditions, to the entry by the SEC under Section 11(b)(1) of the Act of an order requiring Commonwealth's divestment of its interest in the Power Company. Thereupon, active negotiations were undertaken by Commonwealth with both Electric & Gas and the Authority for possible sale to them of such interest. At about the same time, namely in May 1947, the Power Company, in order to obtain funds for its construction program, offered 200,000 shares of its common stock for sale at competitive bidding at a price of $12 per share or better, Commonwealth having indicated its willingness to purchase at that price. Receiving no bid for such stock of $12 per share, it accordingly sold such stock to Commonwealth at that price (R-SEC 145-150).

On August 1, 1947 the SEC entered the divestment order requiring the disposition by Commonwealth of all its interest in the Power Company. Thereafter negotiations with Electric & Gas and Authority continued. Eventually Commonwealth received a final offer from Electric & Gas to purchase the stock at $12.75 per share, plus certain additional considerations. (R-SEC 154-155).

During the negotiations with the Authority there was no serious dispute that the legal power of Authority to purchase was doubtful. In fact, it was recognized by Authority in the course of these negotiations that it could not either make or finance such a purchase unless it obtained a favorable decision from the South Carolina Supreme Court establishing its legal power to purchase (R-SEC 151, 184-185, 206-207). This doubt was caused by the earlier decision of the Supreme Court of South Carolina in *Creech v. South Carolina Public Service Authority, supra.* In that case the court enjoined an attempted purchase by Authority of Electric & Gas and its then associated company, Lexington Water Power Company, since absorbed by Electric & Gas, as beyond the powers vested in the Authority by the act of South Carolina creating the Authority.

In the course of the negotiations with the Authority Commonwealth, in view of the "grave doubt" as to the Authority's legal power to buy, proposed certain conditions to be included in any contract of sale should an agreement be reached as to price and other terms. Among the more important of these conditions was one providing that, if the Supreme Court of South Carolina should hold to its opinion in the *Creech* case and rule against the Authority's power to buy, then the Authority would extend its contract with the Power Company for the sale to the latter of electric power for a period of 25 years. This condition was obviously important to Commonwealth because if, after a litigation, the Supreme Court should hold to the *Creech* opinion on the Authority's power to buy, Commonwealth might not be able to consummate a sale to Electric & Gas or any one else on satisfactory terms, and certainly not on terms as satisfactory as those Electric & Gas was then offering, and if the Authority should thereupon refuse to sell power to the Power Company, Commonwealth would suffer a further very substantial reduction in the value of such stock. (R-SEC 150-153, 161-163). The Authority refused

to accept this or the other conditions proposed by Commonwealth but did eventually increase the price that it would have been willing to pay, could it buy, for the stock of the Power Company. This offer was conditional upon its obtaining the required favorable decision of the South Carolina Supreme Court.* The price so contingently offered was also higher than that of Electric & Gas.

The Board of Directors of Commonwealth thereupon considered at length the offer received from Electric & Gas and the offer received from the Authority and, in the exercise of their best business judgment, decided to accept the offer of Electric & Gas "as the surest and the best way we could get the largest amount of money" (R-SEC 20, 196-197, 225-228). Thereafter the Authority indicated its willingness to "enter further discussions of conditions"

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* Petitioner's assertion that Commonwealth "reneged" on an agreement with the Authority which would have made it possible for the Authority to obtain the initiation of litigation to further test its power to buy is patently false since a contract of sale was treated throughout the negotiations as an essential to the initiation of any such litigation and Commonwealth and the Authority never were able to or did agree upon mutually satisfactory terms for such a transaction. Petitioner's assertion that an order of the SEC requiring Commonwealth to offer the stock at competitive bidding to the highest bidder having legal power to buy would have laid the basis for litigation to obtain the required decision, is based not on authorities but solely on a statement of counsel for the Authority in argument in the SEC hearings, and a reference to Section 668 of the Code of Laws of South Carolina. The assertion will not stand analysis since Section 668 requires an agreed statement of facts by "parties to a matter in dispute, which may be the subject of a civil action" and an affidavit "that the controversy is real". Such an order would not provide a "matter in dispute which may be the subject of a civil action" any more than the offers Commonwealth had already made nor would it facilitate the obtaining of an agreed statement of facts (R-SEC 184-185, 191). It is clear, therefore, that the possibility of obtaining the required decision on such a basis is wholly conjectural and, at the very least, gravely uncertain.

but it was then too late for a contract with Electric & Gas had been signed (R-SEC 213).

After Commonwealth and Electric & Gas had signed a contract covering the sale, each proceeded to obtain the necessary authorizations of regulatory bodies having jurisdiction. As Commonwealth is a holding company, the sale by it required the approval of the SEC. Electric & Gas's purchase required the approval of the FPC and the issue by Electric & Gas of securities to finance the acquisition required the approval of the South Carolina Public Service Commission.

Authority, with certain other objectants, participated in hearings and arguments before all three commissions. The three commissions overruled the Authority's objections and arguments and granted the approvals requested. The order of the State commission has since been confirmed in all respects on review by the South Carolina courts (R-SEC 214-224, 292). Electric & Gas was not a party to Commonwealth's proceedings before the SEC; Commonwealth was not a party to Electric & Gas's proceedings before the FPC or the State commission.

The SEC order was issued March 25, 1948. It provided that the authority granted was subject to Rule U-24 of the SEC's General Rules and Regulations under the Act. This rule requires that transactions shall be carried out within 60 days from the date of the order authorizing the sale. Sixty days from March 25, 1948 was Monday, May 24, 1948.

The last order issued was that of the FPC on April 29, 1948. On receipt of that order Electric & Gas proceeded immediately to make sales of its securities in amounts necessary to finance the purchase and for other purposes. Of the approximately $12,850,000 so obtained, approximately $6,650,000 was derived from sales of securities to existing stockholders of Electric & Gas and, through 26 underwriters, to the public, or a total of approximately 6,500 investors throughout the United States. The balance was derived from loans.

On May 18, 1948, and six days before the expiration of the sixty-day period, no petition for review of the orders of the SEC or FPC having been filed and no application having been made for a stay of either thereof, the transaction was consummated and Commonwealth delivered its stock in Power Company to Electric & Gas and received the purchase price. From the proceeds of the financing by Electric & Gas it provided for the payment not only of the purchase price of the stock but also of approximately $350,000 for underwriting commissions and expenses and for an advance of approximately $1,680,000 to Power Company, which Power Company applied to payment of its outstanding bank loans.

The order of the SEC reserved jurisdiction to it over the use by Commonwealth of the proceeds of the sale of the stock. Following consummation of such sale, Commonwealth requested and received authority of the SEC to use said proceeds or an amount equal thereto in the acquisition of additional shares of common stock of The Southern Company, a subsidiary of Commonwealth. On July 15, 1948 Commonwealth applied $10,200,000 to the purchase from The Southern Company of 1,020,000 shares of its common stock and The Southern Company used said $10,200,000, together with other funds, to purchase for $13,000,000 additional shares of common stock of its subsidiary companies, Alabama Power Company and Georgia Power Company. Said companies in turn have used or are using said monies, with the approval of their respective public service commissions, in the construction of power plants, transmission lines and other capital additions.*

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* The facts relating to the consummation of the sale by Commonwealth and its use of the proceeds therefrom are contained in the affidavit of Justin R. Whiting, President of Commonwealth (R-SEC 283-290). The facts relating to the consummation by Electric & Gas of such purchase, and the financing thereof, are contained in the affidavit of J. M. Costello, Vice-President of Electric & Gas (R-SEC 291-299).

ARGUMENT.

SUMMARY

This case, while of importance to Commonwealth and to Electric & Gas and their stockholders, is of little or no public importance and lays down no important principle of Federal or State law.

What this case is has been succinctly and accurately summarized in the opinion of the Court of Appeals:

> "There can be no question but that the order of the S.E.C. approving the sale by Commonwealth and Southern and the order of the F.P.C. approving the purchase by Electric and Gas would be unassailable but for the offer made by the Authority; and we agree with the S.E.C. that the decision in the Creech case raises such doubt as to the ability of the Authority to purchase that its offer should not be considered as ground for invalidating the proposed sale. * * * (R-SEC 313)
>
> "The case comes to this: Commonwealth and Southern has been ordered by the S.E.C. to divest itself of the Power Company stock. It has worked out a plan to carry out this order by sale to Electric and Gas. There is abundant evidence that the sale is fair to all parties, that it will result in divesting Commonwealth and Southern of all control over the property and that the ownership by Electric and Gas is consistent with the proper and economical development of an adequate supply of electrical energy in the territory. Under such circumstances we are bound by the findings of the Commissions approving the sale and purchase as in the public interest." (R-SEC 316)

All the objections are caused by a disgruntled and disappointed would-be purchaser who was not in a position to make anything resembling an unconditional bid for the

property. If this would-be purchaser were a private corporation whose legal power to purchase this property under its charter was in doubt, no one would have dreamed that it would be reasonable for Commonwealth to have jeopardized a most favorable sale in order to wait for an unknown period while that legal question was being litigated. Surely the fact that petitioner was an authority created by the State of South Carolina, entitled it to no special privileges in this respect. Its standing to even raise the question is at least highly doubtful.

POINT I

The United States Circuit Court of Appeals did not decide in this case "an important question of local law in a way probably in conflict with applicable local decisions."

The chief argument by petitioner to bring this case within the provisions of Rule 38(b) of the Rules of this Court is that the court below "has decided an important question of local law in a way probably in conflict with applicable local decisions". The answer is that the issue in this case was not whether, under the law of South Carolina, the Authority had legal power to buy. The issue was whether Commonwealth and the SEC were justified in considering that, under the law of South Carolina, the decisions of its courts and the other facts, there was a substantial doubt as to the legal (and factual) power of the Authority to buy. The decision of the SEC was expressly based not on what the Commission thought would be the final outcome of the question in the courts of South Carolina but on the fact "that there is grave doubt concerning the Authority's ability to acquire the common stock of Power". The court below based its decision on the same reasoning. It said:

> "we agree with the S.E.C. that the decision in the Creech case raises such doubt as to the ability

of the Authority to purchase that its offer should not be considered as ground for invalidating the proposed sale." (R-SEC, p. 313)

The court below then continued:

"As the matter was put up by the S.E.C.:

> 'On the record before us, we are persuaded that there is grave doubt concerning the Authority's ability to acquire the common stock of Power, that a substantial period of time may be necessary to resolve that doubt, and that the real danger to Commonwealth from delay and from an adverse ruling and the fact that there is only one other prospective purchaser in the field, are (fol. 320) sufficient to support Commonwealth's decision to sell to Electric & Gas. It is obvious that the legal questions involved can be determined finally only by the appropriate State Courts, and we do not purport to forecast the probable outcome or the period necessary to obtain a final decision. However, an attempted sale to the Authority might result in long delay and ultimate failure. Such delay would involve cash stringency, in view of the pending construction program of the Commonwealth system. A final determination adverse to the Authority would leave Commonwealth in a substantially impaired bargaining position, and might well result in its inability to procure a satisfactory price for its interest in Power. Under the circumstances, we cannot find that the management's acceptance of the bid of Electric & Gas was unwarranted.'

That the S.E.C. did not over-estimate the obstacle presented by the *Creech* case is perfectly clear." (R-SEC 313)

The court then proceeded to discuss in detail the *Creech* case and to say that in its opinion (as in ours) the *ratio decidendi* of the *Creech* case would prevent the Authority from purchasing the property here in question but the whole discussion of the *Creech* case was merely for the purpose of showing that Commonwealth and the SEC could hardly have reached any conclusion other than the one they did reach, namely, that real and substantial doubt existed as to the legal power of the Authority to purchase. That and that only was the decision of the SEC which the court in its opinion and order confirmed.

This decision is therefore in no respect a holding binding upon the Authority or the taxpayers of South Carolina with respect to the legal power of the Authority to purchase existing utility plants. It is merely a decision that until the South Carolina Supreme Court holds that the opinion in the *Creech* case does not apply to purchases generally there is, to say the least, "grave doubt" as to how that court will decide the question and therefore like doubt as to the existence of power in the Authority to make such purchases.

The fact that such doubt existed and was sufficient to prevent the Authority from consummating such purchases, even before the SEC or court decisions in this matter, is evidenced by the admitted fact that the underwriters to whom the Authority desired to sell securities to finance a purchase by it of Power Company would not agree to purchase such securities until the Authority had obtained a decision establishing its legal power to make such purchase (R-SEC 185). Since this doubt depends upon and can only be removed, if at all, by another decision of the Supreme Court of South Carolina, nothing that this Court could say on this point could be wholly effective to relieve the Authority of the situation created by the opinion in the *Creech* case. That this is so is implicit in petitioner's argument, that the question of its legal power is a question of State law which should have been referred to the State

Courts, a hypothetical course which the SEC fully considered and, in view of the "grave doubt" and uncertainties inherent in it, rejected as too risky.

As to the merits of the conclusions reached on this point by the SEC and the Circuit Court of Appeals, the opinions of the SEC and of the Court amply demonstrate the correctness of their decisions that there was "grave doubt" as to the power of the Authority to consummate a purchase. This is also apparent from a reading of the *Creech* opinion.*

POINT II

The Commissions considered all relevant evidence in authorizing the transaction involved and no important question of Federal law is presented.

No question is raised that the records below are not full and complete or that any relevant testimony was excluded from the record. It is clear from a study of the regulatory acts that the SEC had jurisdiction to consider the propriety of the sale by Commonwealth and the FPC had jurisdiction of the propriety of the purchase by Electric & Gas. It must be remembered that regulatory commissions are not the managers of the property. It is not for them to substitute their judgment in place of the judgment of the directors of the respective companies. The acts are regulatory acts; they are aimed to prevent abuses by

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* Petitioner puts great stress on the disposition made by the South Carolina Supreme Court of a petition for rehearing and reconsideration made by the Authority in the *Creech* case. Both opinions below dispose of this contention in detail. It is significant, moreover, that the South Carolina Supreme Court itself attached so little importance to its action on the petition for rehearing and reconsideration that the same is neither reported nor even referred to in the reports of that Court. It is surprising, therefore, to find petitioner still arguing that that Court intended by its disposition of the petition to completely reverse the *ratio decidendi* of its published opinion.

managements. Both commissions, after examining all of the facts, considered that this was a good sale by Commonwealth and a good purchase by Electric & Gas and that there was nothing inconsistent with the public interest in letting the sale go through. As far as the interests of consumers are concerned, it was pointed out that rates charged in South Carolina are subject to regulation by the South Carolina Public Service Commission.

Petitioner seems to feel that the commissions should have used their authority to force Commonwealth, even at the expense of a serious financial risk, to continue for an indefinite period to attempt to consummate the sale to the Authority because in their opinion such a sale would have been *ipso facto* more in the public interest than a sale to Electric & Gas.* We submit that any such theory which

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* The petition and brief are full of statements and arguments designed to show that the record would have supported a finding, if the issue had been reached by any of the commissions considering the matter, that a sale to the Authority would have been more in the public interest than a sale to Electric & Gas. This is denied. There is ample and substantial evidence in the record which would support a finding that a sale to Electric & Gas was more in the public interest than a sale to the Authority, even assuming that such a sale was legally possible. In fact, a very large part of the record before the South Carolina Public Service Commission is devoted to testimony and statements by consumers to that effect. (See R-SCPSC Vol. 3, *passim;* Vol. 4, pp. 11-29; see also Vol. 7, pp. 135-136; Vol. 8, pp. 57, 123). Moreover, the issue is basically the political question of the preferability of public ownership as against private ownership of public utilities. It is submitted that such an issue is not one for decision by an administrative agency as distinguished from the legislature, even should such decision be presented to such an administrative body in a proper case, as it was not here. In any event, it is clear that there is nothing in either the Public Utility Holding Company Act or the Federal Power Act which established the claimed preferability of public power over private power as one of the "public interests" to be forwarded by the commissions in the administration of those Acts.

would lead to the preferring of the Authority over a private company merely because the Authority is a state owned body is completely foreign to the whole substance of regulatory law as it has been developed in this country. We submit that even if the business considerations as between a bid of a private purchaser and of a public authority were relatively equally balanced, there is nothing in either the Public Utility Holding Company Act or the Federal Power Act which would justify the commissions under those acts to attempt to force a sale to either one as against the other. That decision is left by both acts as a function of management and the decision of management, unless detrimental to the public interest, is not to be disturbed. But in this case, in view of the grave doubt of this particular public authority's ability to buy, the business considerations were not at all equal. In the opinion of the management, in which opinion the SEC concurred, the Electric & Gas bid was the more favorable and the price was a good one. That should end the matter in so far as the sale by Commonwealth and the approval by the SEC are concerned.

As for the FPC, it did pass on the public interest involved in the purchase by Electric & Gas. It considered whether Electric & Gas and the Power Company had sufficient facilities to adequately serve the present and future needs of the area. It said, among other things:

> "The systems of the Applicant and the Power Company are interconnected and their operation will be integrated as a result of the stock acquisition. Integration of the properties will permit more efficient and better utilization of existing transmission facilities. Completion of construction initiated by the Power Company will create an additional transmission line so as to enable loop operation between the eastern and western load centers of the integrated properties. Additional operating benefits and economies can flow from the use of the

most efficient steam plants to carry the base load, thereby permitting accumulation of storage in hydro projects to carry peak loads. Integration of the properties will diminish the reserve capacity required to maintain service, as the indicated reserve required for the integrated properties would be practically the same as that for the separate properties independently operated. It is reasonable to conclude that some benefits may be derived from the consummation of the proposed acquisition.

* * *

"In conclusion we *find* that * * *

(2) The acquisition of the common stock of the Power Company upon the terms and conditions proposed, as hereinafter authorized will be consistent with the public interest." (R-FPC 8-9).

It did refuse to go into the hypothetical situation which would have been created had the Authority established its legal right to make the purchase and had the sale to the Authority been authorized by the SEC and had approval then been asked of the FPC of such hypothetical purchase. It was dealing with the issue before it and not on issues which were not before it. There can be no complaint as to that.

Conclusion.

The issues presented in these proceedings are very narrow ones because of the unusual situation and "grave doubt" created as to the legal power of the Authority to purchase the stock of Power Company by the opinion of the Supreme Court of South Carolina in the *Creech* case. Because of that decision the broad issues which petitioner asserts are presented are not reached. The doubt as to

the Authority's legal power to buy would not be removed by a review by this Court of the decisions herein. The petition presents no facts to bring this case within any of the provisions of Rule 38(b) of the Rules and, therefore, the writs should be denied.

Respectfully submitted,

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